Supreme Court of The United States

OCTOBER TERM, 1958

No. 39

JOSEPH ANTHONY ACCARDI,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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SUPREME COURT OF THE UNITED STATES

October Term, 1958

No.

JOSEPH ANTHONY ACCARDI,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 30, 1958.

Citation to Opinions of the Lower Courts

The decision of the District Court is not reported. The opinion of the Court of Appeals, reproduced in full in Appendix A, page 7, *infra*, is not yet reported. The order denying petitioner's application for rehearing is reproduced in Appendix B, page 17, *infra*.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on June 30, 1958. Petitioner's application for

rehearing was denied by order dated and entered on August 27, 1958. The jurisdiction of this Court is invoked under the provisions of 28 United States Code 1254(1).

Questions Presented

1. Whether there was sufficient evidence in the record at the conclusion of the Government's case to connect petitioner to the conspiracy charged.

2. In the alternative, whether petitioner participated in the conspiracy charged as the direct result of entrapment.

Statute Involved

The statute involved is 18 United States Code 371, which reads:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Statement of the Case

Joseph Anthony Accardi, petitioner herein, was indicted with three other named persons for violation of Title 18 United States Code 371 for conspiring to violate

certain specified statutes pertaining to the narcotic traffic. Trial on this indictment was held in the United States District Court for the Eastern District of Louisiana on November 26, 1955, before a jury. A verdict of guilty as to each defendant was returned by the jury with recommendation of mercy as to the petitioner herein. The facts leading to the verdict aforesaid are as follows:

On May 4, 1955, one Michael G. Picini, working in an undercover capacity for the Federal Narcotic Bureau in the company of one Charles Underwood, contacted Joseph Anthony Accardi in Memphis, Tennessee. It is admitted that the narcotic agent and Charles Underwood were acting on information supplied to them by one Eddie Collier (R. 149, 150), who admittedly had violated both federal and state narcotic laws immediately prior to furnishing such information and who had not been charged with any such violation (R. 150, 151, 153). Joseph Anthony Accardi was first contacted at the Bluff City Refrigeration Company (R. 49), where he was admittedly gainfully employed, and of which business he was 50% owner (R. 217).

Narcotic Agent Picini, on direct examination, made no reference whatsoever to any conversation with Joseph Anthony Accardi pertaining to the purchase of a deep freeze or refrigerator by Agent Picini from Accardi (R. 47-59). However, on cross examination, Agent Picini admitted that he spoke with Accardi about the purchase of a deep freeze for his wife and that they also had a general conversation about refrigerators and freezers (R. 61, 119). Charles Underwood, who testified that he was with Agent Picini and Accardi at all times during the first meeting, did not hear any conversation concerning the purchase of a deep freeze (R. 145, 157, 158).

After the discussion between Agent Picini and Accardi on May 4, 1955, concerning the purchase of a deep freeze, Agent Picini requested Accardi to secure marijuana for him. Accardi stated that he did not have any marijuana, but he agreed to contact someone in New Orleans for the purpose of assisting Agent Picini (R. 50). It is undisputed that Accardi was unable to make this contact on May 4, 1955 (R. 52, 144). Agent Picini admitted that on this occasion and on subsequent occasions he furnished Accardi the money to make the long distance telephone calls (R. 62).

After May 4, 1955, the Government relied entirely upon the testimony of Agent Picini to connect Joseph Anthony Accardi to the conspiracy charged. Agent Picini testified that on May 5, 1955, Joseph Anthony Accardi, at the request of Agent Picini, came to the King Cotton Hotel in Memphis where Agent Picini was staying and, again at the request of Agent Picini, once more attempted to contact someone in New Orleans for the purpose of arranging a marijuana transfer (R. 52, 53).

Agent Picini testified that on May 6, 1955, he received a long distance telephone call at the King Cotton Hotel and that a message was left for him to call a man by the name of Steve at a given telephone number in New Orleans. On the same date, Agent Picini made this call at the given number and spoke to a man who said he was Steve (R. 52, 53). The man named Steve was never identified by Agent Picini or any other witness as one of the persons named in the indictment as a co-conspirator of Joseph Anthony Accardi.

The Government offered no further evidence to link Joseph Anthony Accardi to the conspiracy charged. Both

Agent Picini and Charles Underwood testified that they had no personal knowledge that Accardi had ever been connected with the narcotic business in any manner whatsoever (R. 65, 66, 146).

At the conclusion of the Government's case, Joseph Anthony Accardi urged a motion for a directed verdict, which motion was overruled by the trial court.

Reasons Why Writ Should be Granted

Petitioner for writs filed a timely motion for a directed verdict at the conclusion of the Government's case in the District Court and he was thereby entitled to have the sufficiency of the evidence against him determined from the record at the time he urged said motion. The only evidence in the record at that time is that Joseph Anthony Accardi, after repeated requests by Federal Narcotic Agent Picini, contacted someone in New Orleans and left a message with that someone to call Agent Picini in Memphis, Tennessee, and that thereafter Agent Picini received a telephone call and spoke with a man named Steve, who has never been identified as one of the conspirators named in the indictment. This evidence is insufficient to prove the essential elements of a conspiracy.

In the alternative, the evidence in the record clearly shows that Joseph Anthony Accardi, applicant herein, performed the acts testified to as the direct result of repeated requests by Federal Narcotic Agent Picini and after having been offered an inducement in the form of the sale of a deep freeze. The facts clearly indicate entrapment as defined in the decision of this Court in *Sorrells vs. United States*, 287 U.S. 435, 53 S. Ct. 210.

77 L. Ed. 413, the facts of which case are clearly analogous to the case at issue.

WHEREFORE, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court entered herein.

ROBERT R. RAINOLD,
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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16467

JOSEPH ANTHONY ACCARDI, STEPHEN MORALES and HERMAN JOHN DOMING,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(June 30, 1958.)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge. The question before us is whether the conviction of Joseph Anthony Accardi should be set aside on the ground that *as a matter of law* he was entrapped by government agents.

Accardi, Herman John Doming, Stephen (Steamboat) Morales, adn Anthony Segro were indicted for conspiracy

to acquire and transfer marihuana in violation of the law.[1] Segro pleaded guilty; the other defendants went to trial. The issue of entrapment went to the jury.[2] The jury found all the defendants guilty. But—it recommended leniency for Accardi. Each defendant was sentenced to five years imprisonment. Doming and Morales argue that if the defense of entrapment is valid as to Accardi, it is valid as to them.

I.

Some time in March, 1955, Michael G. Picini, a federal narcotic agent, was working as an undercover man in an investigation in Memphis, Tennessee. Working with him was Charles Underwood, an informer and special employee of the Bureau of Narcotics. Underwood had been employed by Eddie Collier, then under investigation. Accardi was a friend of Collier and Underwood. Acting upon information supplied by Collier, Picini and Underwood went to Accardi's place of business in Memphis, the Bluff City Refrigeration Company in Memphis. Underwood introduced Picini to Accardi as Mike Philano of Philadelphia.

According to Picini, this is what happened. Picini told Accardi that Eddie Collier had said that Accardi would supply him with marihuana. Accardi said that he had none at the time but volunteered the information that "he had a connection in New Orleans". He did not want to talk about it in his place of business; he suggested that they go across the street to a restaurant to discuss it. Picini told Accardi that he was looking for both heroin and marihuana. Accardi said that he

[1] 18 USC 371; 26 USC 4744(a) and 4742(a); 4744(2) and 4742(a) of the Internal Revenue Code of 1954, Marihuana Tax Act of 1937, as amended.

[2] The charge to the jury is not in issue here.

would meet Picini and Underwood an hour or so later at the Pig and Whistle restaurant. They met, and Accardi went into a drug store near there, "looked into a little notebook and got a number", and put in a telephone call to New Orleans. Picini overheard him ask for Steamboat. Accardi told Picini that he was unable to reach his man in New Orleans but that he would try to reach him later that day and then get in touch with Picini. Later Picini called Accardi who said that he would meet him at the King Cotton Hotel the next morning. Accardi arrived at the hotel in the morning and promptly put in another call to Steamboat in New Orleans. The call was not completed to Steamboat, but Accardi told the agent "that he had made arrangements for someone in New Orleans to call [Picini] at Room 619 in the King Cotton Hotel". The following day, May 6, Picini received a telephone call at the hotel. He was not there at the time. A message was left for him to call a certain number in New Orleans and ask for "Steve". Picini called Steve. Steve "told me that his sister had told him to call this number; that Joe Accardi had left word for him to call that number. He asked me what I wanted and I told him I was looking for some marihuana and some heroin. He said, 'Well, we can take care of you down here. How soon can you get down?' I told him at that time that I would call him in a couple of days. He told me to call that number again and ask for 'Steamboat'." May 9, Picini called the same number and talked with Steamboat. He said that he had "made arrangements with guys across the river and that they could supply me with anything I wanted; for me to come to New Orleans". May 13 Picini received a call from Steamboat who told him "that the boys were waiting for me to come down; that they had the stuff ready". May 14, at a motel in New

Orleans, in the presence of Doming and Steamboat Morales, Picini paid Anthony Segro $2,000 for four and a half gallons of marihuana. No efforts were made to arrest the defendants at that time and on June 18 Picini was negotiating with Segro for the purchase of heroin. Sometime after May 14 and before June 18 Picini telephoned Accardi in Memphis and offered him a fee. Accardi told Picini that he would get in touch with him later but never did.

Underwood, who was present at the first two meetings with Accardi, corroborated Picini. Picini and Underwood testified that Accardi needed no urging; he put the agent in touch with his supplier in New Orleans as promptly as long distance telephoning permitted. The agent denied that he had enticed the accused by holding out the lure of buying a deep freeze refrigerator for his wife; he did not discuss the subject but once and then only in the restaurant, making conversation. Underwood did not recall the conversation.

Accardi's account of the facts is entirely different from the agent's. He testified that Underwood introduced Picini as a friend from Philadelphia who wanted to buy a deep freeze refrigerator for his wife. They discussed "models and kinds with reference to a possible purchase for his wife". When they went across the street Picini put his arms across Accardi shoulders and began talking Italian. Accardi told Picini. "I don't know nobody [who has marihuana] and I don't want to be associated with it. I'm in the refrigeration business". "Finally, Mike kept egging me on to—if I knew anybody he could buy any marihuana from and I kept denying it—then it dawned on me that he might be able to buy some from a man named 'Steamboat' in

New Orleans". Accardi had never seen or heard of any of the defendants except Steamboat Morales. He had seen him once in a crowded bar in New Orleans on New Year's Eve. A friend had said that "anytime you all need any weed, that Steamboat knows somebody that could help you out". Accardi attempted to reach Steamboat Morales at the Sho-Bar Club in New Orleans. Steamboat was not there but he was given a number where Steamboat could be reached. Accardi returned the change Picini had given him to telephone. "Here's the number . . . You go ahead on and call yourself". Later that day, or the next morning, Picini invited him to come to the King Cotton Hotel to meet him. Accardi expected to talk about the deep freeze refrigerator. Instead Picini again asked him to call his contact in New Orleans. Again Accardi failed to reach Steamboat. He then told Picini that he was through. That was the last he had to do with Picini until sometime around the end of May when Picini telephoned him, invited him to dinner, and told him that he would give him a fee. Accardi refused it. "I don't want to have none of that money, don't want to have nothing to do with this sort of business and I hung up".

II.

This Court has frequently dealt with the defense of entrapment.[3] Since 1932 we have often quoted and

[3] Saucedo v. United States, 1920, 5th Cir., 268 F.2d 830; Adultman v. United States, 1925, 5th Cir., 289 F.2d 251; Ybor v. United States, 1929, 5th Cir., 31 F.2d 42; Vamas v. United States, 1926, 5th Cir., 13 F.2d 347; Garigano v. United States, 1928, 5th Cir., 24 F.2d 625; Hunter v. United States, 1932, 5th Cir., 62 F.2d 247; Wall v. United States, 1933, 5th Cir., 65 F.2d 993; Hill v. United States, 1951, 5th Cir., 23 F.2d 223; Weathers v. United States, 1941, 5th Cir., 117 F.2d 585; Demos v. United States, 1953, 5th Cir., 205 F.2d 596; Hamilton v. United States, 1955, 5th Cir., 221 F.2d 611; Rodriguez v. United States, 1955, 5th Cir., 227 F.2d 912; Kivette v. United States, 1956, 5th Cir., 230 F.2d 749; Henderson v. United States, 1956, 5th Cir., 237 F.2d 169.

relied on *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413. In that case the Supreme Court read a legislative intent into criminal statutes that Congress could not have intended that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them. Whatever intent Congress had, if any, as to entrapment, the criteria laid down in Sorrells relate to the "intention" of the accused to commit an offense he would not have committed but for the inducement of the government agents: "The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."

In *Sherman v. United States*, , U.S. , S. Ct. , L.Ed. , five of the justices adopted the rationale of the majority in Sorrells: "However, the fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law-enforcement officials. See 287 U.S. at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for unwary criminal." This rationale throws the main emphasis on the "predisposition" of the accused to commit the crime. We take it that "predisposition" means something more than "disposition" and is intended to refer to the char-

acter and intentions of the accused as an "unwary innocent" (if the conviction is reversed) or as an "unwary criminal" (if conviction is affirmed).

The majority opinions in the Sorrells and Sherman cases, and the uniform holdings in this circuit, make the factual issue of entrapment a question for the jury—unless as a matter of law the accused has established beyond a reasonable doubt that he was entrapped. In this case, we cannot say as a matter of law that Accardi was entrapped. In the Sheman case the court relied on undisputed evidence.[1] Here, there is so much conflicting testimony on material facts bearing on the inducement and Accardi's readiness or willingness to commit the offense charged, that the issue was properly submitted to the jury.

Approaching the question in its light most favorable to the government, there was ample evidence for the jury to draw the inference of guilt with no entrapment. According to Picini and Underwood, Accardi showed no hesitancy. Accardi volunteered the information that he had a connection in New Orleans. He looked in a little notebook before telephoning Steamboat. He met three times within twenty-four hours to discuss the transaction. Steve and Steamboat were willing to deal with Picini by telephone, after they learned that he had been

[1] Sherman v. United States, ... U.S. . . . . S.Ct. . . . . L.Ed. . . . . was a strong case. The undisputed evidence showed that the government informer and the accused were both under treatment from the same physician for drug addiction. There were recurring meetings and exchanges of mutual experiences in regard to drug addiction. The informer had to make repeated requests before he overcame the defendant's refusal first and then his evasiveness and hesitancy. There was no evidence that Sherman was in the narcotics trade. The government informer finally enticed the accused who was attempting to avoid narcotics, not only into carrying out an illegal sale but also into returning to the drug habit. The Court concluded from the undisputed evidence that entrapment was established as a matter of law.

referred to them by Accardi. To believe Accardi's story that he did not know Segro and Doming and he had seen Morales only once, and then in a crowded bar in New Orleans on New Year's Eve—the jury would have to infer that the other defendants are uniquely naive and trusting traffickers in narcotics willing to return a stranger's telephone call and negotiate by telephone a narcotics sale with a stranger. Or the jury could infer that Accardi was well known to the other defendants, was part of their conspiracy, and had the "predisposition" to commit the offense charged; an "unwary criminal".

III.

Detection of narcotics offenders is difficult. They deal by stealth and strategem; they must be detected by stealth and strategem. Nevertheless, even in ferreting out such law violators, government detection methods must measure up to reasonably decent, civilized standards for the proper use of government power. Police methods designed to tempt innocent persons into crime are as objectionable as the coerced confession and the unlawful search. The majority opinion in Sherman reaffirms the emphasis on the defendant's intention or readiness to commit the crime, as basic in rebutting entrapment; but the Court by no means downgrades the duty of scrutinizing closely the conduct of the government agents.

In the concurring opinion in Sherman v. United States, Mr. Justice Frankfurter with whom Justices Douglas, Harlan and Brennan concurred, observed that: "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. . . . Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." The opinion quotes Mrs. Justice Holmes in Olmstead v. United States, 277 U.S. 483, 470, 48 S.Ct. 564, 72 L.Ed. 944: "[F]

In addition therefore to considering the predisposition (character and general intention) of the accused, as clearly required under the Sorrells and Sherman cases,

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or my part I think it a less evil that some criminals should escape than that the Government should play an ignorable part. Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts."

The concurring opinion in the Sherman case argues that: "The crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the intention to commit the crime originated with the defendant or government officers." This crucial question, the minority contend, is appropriate for the court, not the jury; only the court can give "significant guidance for official conduct . . . with the degree of certainty that the wise administration of justice demands". The majority, on the other hand, hold that the crucial question is the intention or readiness of the accused to commit the crime; that this is a factual issue for the jury as part of its function of determinating the guilt or innocence of the accused—unless the court can decide it as a matter of law.

In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the minority to the *conduct of the government agents*. There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods. "The function of law enforcement is the prevention . . . not . . . the manufacturing of crime." The agents "beguiled" the accused, "play[ed] on the weaknesses of an innocent party", and ended by inducing him to return to the drug habit. "Law enforcement does not include methods such as these." The Court's statutory construction that Congress could not have intended its statutes to be enforced by government agents tempting innocent persons into violations is another way of saying that law enforcement officials may not prostitute government power. Similarly, in Sorrells v. United States, in construing the Prohibition Act to exclude enforcement by abuse of the processes of detection the Court said: "If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice. This view does not derogate from the authority of the court to deal appropriately with abuses of its process and it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute".

we have weighed carefully the conduct of the government agents. Here, we cannot say that the undisputed evidence shows that the government agents exceeded the proper use of government power. We cannot say that by guile and low cunning, unsuitable for law enforcement officers, agents provocateurs enticed into crime an unwary innocent who would otherwise have struggled within himself and resisted ordinary temptations. On such evidence as is undisputed, the agents' conduct does not shock the conscience of this Court. There was no entrapment as a matter of law.

Judgment is

AFFIRMED.

A true copy

Test: s/ EDWARD W. WADSWORTH

EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

(SEAL)

APPENDIX B

JUDGMENT

Extract from the Minutes of June 30, 1958.

JOSEPH ANTHONY ACCARDI, HERMAN JOHN DOMING and STEPHEN MORALES

No. 16467

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for certiorari has been served by the undersigned having mailed copies thereof on September ____, 1958, addressed as follows:

M. Hepburn Many,
U. S. Attorney, Eastern District,
of Louisiana,
Federal Building,
New Orleans, Louisiana.

ROBERT R. RAINOLD
Attorney for Petitioner

LE COPY

Office-Supreme Court, U.S.
FILED
OCT 21 1958
JAMES R. BROWNING, Clerk

Nos. 399 and 294 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH ANTHONY ACCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN MORALES AND HERMAN JOHN DOMING, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 399

JOSEPH ANTHONY ACCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 294 Misc.

STEPHEN MORALES AND HERMAN JOHN DOMING, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 322-332; Pet. in No. 399, pp. 7-16) is reported at 257 F. 2d 168.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 333; Pet. in No. 399, p. 17). Petitions for rehearing (R. 334-345) were denied on August 27, 1958 (R. 346). The petitions for writs of certiorari were filed on September 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the issue of entrapment was properly submitted to the jury for resolution.

2. Whether there was sufficient evidence to connect petitioner Accardi (No. 399) with a conspiracy to acquire and transfer marihuana illegally.

STATEMENT

Accardi, Doming, Stephen "Steamboat" Morales, and Segro were charged in an indictment returned in the United States District Court for the Eastern District of Louisiana with a conspiracy to violate 26 U.S.C. 4744(a) and 4742(a), by illegally acquiring and transferring marihuana to one Picini (R. 2-5). Segro pleaded guilty (R. 6) and the other three defendants (Accardi, No. 399; Morales and Doming, No. 294 Misc.) were tried by a jury. The verdict was guilty as to all three petitioners, with a recommendation of leniency for Accardi (R. 16). Each petitioner was sentenced to imprisonment for five years (R. 313-316). On appeal (R. 316-317), the convictions were unanimously affirmed (R. 333; Pet. in No. 399, pp. 7-16).

1. The pertinent evidence for the prosecution may be summarized as follows:—

Michael Picini, the principal government witness, was a federal narcotics agent, working as an undercover man in Memphis, Tennessee, with one Underwood, an informant and special employee of the Bureau of Narcotics (R. 47-48, 49, 138, 139, 206-207). Collier, Underwood's employer, had been under investigation as a narcotics law violator (R. 140, 150, 50).

On May 4, 1955, acting upon information furnished by Collier, Picini and Underwood went to Accardi's place of business, the Bluff City Refrigeration Company in Memphis, where Underwood introduced Picini to Accardi as Mike Philano of Philadelphia. Picini stated that Collier had said that Accardi could supply him (Picini) with marihuana (R. 48, 49, 50-51, 71, 141-142). Although replying that he had no marihuana at the time, Accardi volunteered the statement that "he had a connection in New Orleans" (R. 61, 64, 65, 51). Since Accardi was reluctant to talk about the matter at his place of business, the parties went to a restaurant across the street where there was a discussion to the effect that Picini was looking for both heroin and marihuana (R. 51). Picini testified that in the restaurant he discussed with Accardi different models of deep freezes, with reference to a possible purchase for his wife, but that he did not promise that he was going to purchase one (R. 61, 72, 123). Underwood could recall no promise by Picini to buy a deep freeze, but only general conversation as to prices (R. 144-145).

Picini and Underwood agreed to meet Accardi at the Pig and Whistle restaurant in about an hour (R. 51-52). At this meeting place, Accardi drove up in his car to say that "he could not make any local contacts but he then advised that he would be able to—he thought that he could make contact in New Orleans" (R. 143). Accardi went into a drug store nearby, "looked into a little notebook and got a number", and put in a telephone call to New Orleans (R. 144, 52). Picini overheard Accardi ask for "Steamboat." On leaving the telephone booth, Accardi announced that he had been unable to get in touch with "his man" in New Orleans, but that he would try to reach him later. Accardi promised to meet Picini the following morning at the King Cotton Hotel where Picini had Room 619 (R. 52, 73-74, 144).

On the morning of May 5, 1955, Accardi met Picini according to their agreement, made another telephone call in the lobby of the King Cotton Hotel, and informed Picini that "he had made arrangements for someone in New Orleans to call [Picini] at Room 619" (R. 52, 77).

On the following day, May 6, a telephone message was left at the hotel for Picini to call "Steve" at Fillmore 1-8397 in New Orleans. When Picini called this number, Steve [Morales] stated that Accardi had left word for him to call. Steve asked what Picini wanted, and Picini said that he was looking for some marihuana and heroin. Steve stated, "Well, we can take care of you down here. How soon can you get down?" When Picini mentioned that he would call in a few days, Steve directed Picini to call the number

again and ask for "Steamboat" (R. 52-53, 78, 81, 129, 130).

On May 9 when Picini called the same number, "Steamboat" [Morales] announced that "he had made arrangements with guys across the river and that they could supply [Picini] with anything [he] wanted; for [Picini] to come to New Orleans." Picini stated that he was busy at the time, but that he would call "Steamboat" on May 13. On that date, Picini received a collect call from "Steamboat" to the effect that the boys were waiting for him and had the "stuff ready." Picini promised that he would leave Memphis that night (R. 53, 82, 129, 130).

On May 14, 1955 at about 11:00 a.m., Picini arrived in New Orleans and checked into a motel with three government agents who took a cabin adjoining Picini's. Picini telephoned "Steamboat," who put a man named Tony [Segro] on the line. By arrangement, "Steamboat" [Morales], "Zang" Doming, and Segro came to Picini's cabin. While "Steamboat" remained outside the cabin, Doming and Segro by negotiation agreed upon a price of $2,000 for four and a half gallons of marihuana to be delivered about 45 minutes later (R. 53-55, 83-84, 86-90, 163-164, 175-176, 183). After Doming, Morales, and Segro left in their Buick, Segro later returned to the cabin and told Picini to drive him to a certain street where the Buick was parked. Segro transferred the marihuana in a burlap bag from the trunk of the Buick to the trunk of Picini's car. Picini then got into the front seat of the Buick between Doming and Segro and paid Segro $2,000 (R. 55-56, 94-95).

The petitioners were not arrested at this time, and as late as June 18, 1955, Picini was negotiating with Doming and Segro for the purchase of heroin (R. 98-99). Picini testified that, about a week or two after the May 14th purchase, he telephoned Accardi to say that he had made the connection and purchase, and that he wanted to pay Accardi a fee for this. Accardi replied that he would get in touch with Picini later, but he never did (R. 63-64).

The government chemist testified that the substance purchased by Picini was marihuana (R. 193-195, 56-58). None of the defendants was able to produce a required order form for the transfer (R. 177-178, 186-187, 208-209).

2. All three of the petitioners testified on their own behalf:—

According to Accardi, Underwood introduced Picini to him as a friend from Philadelphia who wanted to purchase a deep freeze for his wife (R. 218). The parties left the restaurant across the street from Accardi's store, after Underwood had asked Accardi where he could purchase marihuana and Accardi had answered that he did not know of anyone who had any. In response to Picini's questioning about obtaining marihuana, Accardi stated, "Mike, I don't know nobody and I don't want to be associated with it. I'm in the refrigeration business" (R. 219-220). Accardi continued that "Mike kept egging me on to—if I knew of anybody he could buy marihuana from and I kept denying it and—so then it dawned on me that he might be able to get ahold of this fellow 'Steam-

boat' at the Sho-Bar Club [in New Orleans]" (R. 222). Accardi had met "Steamboat" in a crowded bar in New Orleans in 1954, and had been informed by the doorman that "Steamboat" might help "get some marihuana" (R. 221, 226-227). Accardi denied that he had known Doming and Segro before (R. 224-225). Accardi testified that, when Picini telephoned that he had made connections and wanted to pay a fee for Accardi's trouble, Accardi declined by saying, "I don't want to have none of that money; don't want to have nothing to do with it—this sort of a business" (R. 223-224).

Petitioner Morales testified that, when Accardi telephoned to ask if Morales could purchase marihuana, he stated that he had no connections and did not want to fool with it (R. 237). When Picini called about this subject, Morales answered, "No, I don't know anyone and I don't deal in that sort of business" (R. 239). When Picini called again to say that he was coming to New Orleans to talk to Morales, Morales remonstrated, "Well, I haven't got anything. It is no use you coming down" (R. 240). Morales stated that he contacted Segro to get marihuana just as a favor for Picini (R. 249).

Petitioner Doming testified that, when Segro asked about getting marihuana for Steve's friend from Tennessee, he (Doming) replied, "I don't want to have nothing to do with it" (R. 265), and that he refused a similar request by Morales (R. 266). Doming admitted, however, driving the automobile used in delivery of the marihuana and assistance in

the negotiations as to price (R. 270-271, 283-284, 267-268).

3. The three petitioners relied upon entrapment as a defense (R. 11-15), but they made no objection to the court's charge on this issue (R. 305-306, 308).

ARGUMENT

1. All three petitioners assert that there was entrapment as a matter of law, so that the case should not have gone to the jury at all (Pet. in No. 399, pp. 5-6; Pet. in No. 294 Misc., pp. 3-5). Accardi contends that he was entrapped, and Morales and Doming take the position that Accardi's entrapment "permeates the whole case" (Pet. in No. 294 Misc., pp. 2, 5) so that they were also entrapped as a matter of law.

Unlike *Sherman* v. *United States*, 356 U.S. 369, 373, where the determination that there was entrapment as a matter of law was predicated upon the "undisputed testimony of the prosecution's witnesses", there was here a square conflict between the testimony of government witness Picini and of petitioner Accardi. Picini's version was that, almost immediately after their first meeting, Accardi volunteered without hesitancy to telephone his New Orleans connection to arrange for sale of the marihuana to Picini. See also the Statement, *supra*, pp. 3-4. Accardia, on the other hand, testified that when first questioned about obtaining marihuana, he told Picini that he did not want to become involved in such an undertaking since he was in the refrigeration business; and that it was only after persistent questioning by Picini that Ac-

cardi thought of "Steamboat" Morales as a contact (Statement, *supra*, pp. 6-7). In view of this conflict in the evidence, the question was properly submitted to the jury for resolution. *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435.[1]

In order for the government to disprove the entrapment defense, it was not necessary to show that the petitioners had a predisposition to criminality by reason of a previous background in the narcotics traffic (see Pet. in No. 294 Misc., p. 4). The mere fact that a narcotics sale comes at the instance of a government agent does not show entrapment, nor is every first offender who deals with an agent necessarily entrapped. *Sorrells* v. *United States*, 287 U.S. 435, involved a situation where there was no proof of prior similar criminal activity by the accused, and so also did *Masciale* v. *United States*, 356 U.S. 386. In this case, to refute the defense of entrapment, the government evidence showed "ready complaisance" by petitioners in arranging and making the illegal narcotics sale. The prosecution had not seduced innocent persons, but had merely provided the means for petitioners to realize their preexisting purpose. Cf.

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[1] Apart from reliance upon Accardi's possible entrapment, petitioners Doming and Morales had no independent basis for urging that they were entrapped. Doming did not deal with Picini directly in setting up the sale; and although Morales testified that when Picini first contacted him, he denied dealing in marihuana (Statement, *supra*, p. 7), the jury was entitled to disbelieve this in view of Picini's contrary testimony (Statement, *supra*, pp. 4-5). Cf. *Masciale* v. *United States*, 356 U.S. 386, 388.

United States v. *Sherman*, 200 F. 2d 880, 882 (C.A. 2).[2]

2. The jury, by its verdict, necessarily credited Picini's testimony as against the conflicting testimony of petitioner Accardi. This disposes of the latter's contention (Pet. in No. 399, p. 5) that the evidence was insufficient to connect him with the conspiracy charged. According to Picini, on the day of his first meeting with Accardi the latter stated that he could make no local contacts for marihuana, but that he thought he could reach a contact in New Orleans. He proceeded to do this by making successive telephone calls until he reached "Steamboat" Morales, and made arrangements for Morales to telephone Picini at the hotel in Memphis (Statement, *supra*, pp. 3-4).

Accardi's activities were an important part of the conspiracy in enabling Morales to contact Picini, and make the arrangements which resulted in the ultimate sale of the marihuana. It is significant that by his own testimony Accardi admitted knowing Morales beforehand (R. 221). Unless Accardi had thought that

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[2] Petitioners Morales and Doming contend that the court erred in not instructing that the government had the burden of proving beyond a reasonable doubt that no entrapment existed (Pet. in No. 294 Misc., pp. 2, 5). Petitioners, however, made no objection to the court's charge as given (R. 308), and are in no position to challenge it now. Rule 30, F. R. Crim. P. The charge went thoroughly into the question of the necessity of the prosecution's proving every part of its case beyond a reasonable doubt (R. 293, 295-297), and covered in detail the defense of entrapment (R. 305-306, 308). Cf. *United States* v. *Sherman*, 200 F. 2d 880, 882-883 (C.A. 2), on the question of the burden of proof in regard to entrapment.

Morales was in a position to procure marihuana, he would not have telephoned him in New Orleans. Accardi's implication in the conspiracy is clear, since as soon as Morales was aware that Accardi was behind the transaction, his associates proceeded to make the sale to Picini. It is a fair inference that as narcotics traffickers they would not have done this if Picini had come to them as a total stranger, instead of being vouched for by Accardi.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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